IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,659

ROBERT BEELER POWER,

Appellant/Cross Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

AMENDED REPLY/CROSS-ANSWER BRIEF OF APPELLANT

PAMELA H. IZAKOWITZ
Florida Bar NO. 0053856
Assistant CCRC - South
CAPITAL COLLATERAL
REGIONAL COUNSEL - SOUTH
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601-3294
(813) 259-4424

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT IN REPLY 3

ARGUMENT I

THE LOWER COURT ERRED IN GRANTING THE STATE'S MOTION TO DETERMINE MR. POWER'S COMPETENCE TO ASSIST COLLATERAL COUNSEL AT EVIDENTIARY HEARING WHEN COUNSEL FOR MR. POWER HAS NOT RAISED A COMPETENCY CLAIM AND HAS NO FACTUAL INDICATIONS OF MR. POWER'S INCOMPETENCE. 3

ARGUMENT II

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO COMPEL MR. POWER TO UNDERGO A MENTAL HEALTH EVALUATION BY THE STATE, WHEN THE STATE WAIVED ACCESS TO MR. POWER BY FAILING TO REQUEST A PRIOR MENTAL EXAMINATION; WHEN THERE IS NO AUTHORITY FOR SUCH AN EVALUATION; AND THE ISSUES TO BE ADDRESSED AT AN EVIDENTIARY HEARING INVOLVE INEFFECTIVE ASSISTANCE OF COUNSEL. 7

ANSWER BRIEF IN CROSS APPEAL

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PROTECTIVE ORDER PROHIBITING THE STATE FROM OBTAINING APPELLANT'S CONFIDENTIAL MEDICAL RECORDS FROM THE ORANGE COUNTY JAIL. 16

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

CASES

Acosta v. Richter, 671 So. 2d 149, 154 (Fla. 1995) 18

Burns v. State, 609 So. 2d 600 (Fla. 1992) 8

Carter v. State, 706 So. 2d 873 (Fla. 1998) 5

Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994) 12, 13

Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994) 7

Dinkins v. State, 244 So. 2d 148 (Fla.4th DCA 1971) 14

Dobbert v. Florida, 432 U.S. 282 (1977) 8

Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990), rev. denied, 576 so. 2d 286 (Fla. 1991) 10

Estelle v. Smith, 451 U.S. 545 (1981) 10

Fulton v. State, 352 So. 2d 581 (Fla. 3rd DCA 1977) 14

Harich v. State, 437 So. 2d 1082 (Fla. 1983), cert. denied 465 U.S. 1051 (1984) 10

Hunter v. State, 639 So. 2d 72 (Fla. 5th DCA 1994) 18

In Re: Rules Governing Capital Postconviction Actions, Case No. SC00-242 7

Kastigar v. United States, 406 U.S. 441 (1972) 12

Katlein v. State, 731 So. 2d 87 (Fla. 4th DCA 1999) 20

Lloyd Chase, et. al v. Robert Butterworth, Case No. SC00-113 7

Magil v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied 450 U.S. 927 (1981) 10

Malloy v. Hogan, 378 U.S. 1 (1964) 10

Medina v. State, 690 So. 2d 1241 (Fla. 1997) 3

Miller v. Florida, 482 U.S. 423 (1987) 8

Provenzano v. State, 24 Fla. L. Weekly S406 (August 26,1999) . 3

Rasmusen v. South Florida Blood Services, Inc. 500 So. 2d 533 (Fla. 1987) 19

Shaktman v. State, 553 So. 2d 148 (1989) 19

Speedy v. Wyrick 702 F. 2d 723, 727 (8th Cir. 1983) 6

State v. Debra A.E., 188 Wis. 2d 111 (1994) 5

State v. Diguilio, 491 So. 2d 1129 (Fla. 1986) 23

State v. Dixon, 283 So. 2d 1 (Fla. 1973) 9, 11

State v. Drab, 546 so. 2d 54 (Fla. 4th DCA)
rev. denied, 553 So. 2d 1164 (Fla. 1989) . . . 14

State v. Kokal, 562 So. 2d 324 (Fla. 1990) 20

State v. LeCroy, 641 So. 2d 853 (Fla. 1994) 21

State v. Lewis,656 So. 2d 1248 (Fla. 1994) 17

State v. Smith, 260 So. 2d 489 (Fla. 1972) 8, 15

Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998) 1

OTHER AUTHORITIES

Article I, Section 23, Fla. Const 17

Florida Statute Section 395.3025 (4)(d) 18

Florida Statute Section 455.241 (2) 18

Florida Statute Section 455.667 17

Florida Statute Section 945.10 . . . . 17, 21

Florida Statute Chapter 119 19

Drob, Berger & Weinstein, Competency to Stand Trial: A Conceptual Model for its Proper Assessment, 15 Bull. Am. Acad. Psychiatry & L. 85, 85-89 (1987) 5

STATEMENT OF THE CASE

In its Amended Answer Brief, the Appellee asserts that Mr. Power raised a claim questioning his sanity as it relates to the execution of the death sentence. (Amended Answer Brief at 5). The Appellee then cited to Claim XXXI of Mr. Power's Amended Rule 3.850 that said "Mr. Power is insane to be executed." Id.

What the Appellee omitted in its statement of the facts was the following:

> 2. Mr. Power does not at present have access to facts to plead this claim in further detail. However, he raises this claim to exhaust state remedies and to preserve the claim for review in future proceedings and in federal court. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly, Mr. Power must raise this issue in the instant pleading.

(PC-R. 179-180)(emphasis added).

This claim states that Mr. Power does not have facts to plead this claim now but it is being preserved for future proceedings in federal court.

What the Appellee omitted was that this claim currently has no effect on any issue before this Court. What the Appellee also omitted was the fact that this claim currently has no effect on the issues to be addressed by the trial court. The trial court did not grant a hearing on this issue.

The issue was raised in the Rule 3.850 motion to preserve it until such time as a death warrant is signed. It has no effect whatsoever on any claim currently before this Court or the trial court. The Appellee mislead this Court with its representations.

The Appellee also misled this Court about the issues on which an evidentiary hearing has been granted. The Appellee said "the claims included most of those relating to appellant's mental conditioning at the time of sentencing and his ability to make a knowing, intelligent and voluntary waiver of his right to present mitigating evidence." (Amended Answer Brief at 5).

This is flatly contradicted by the record. Mr. Power was granted an hearing on eight claims. Five of those claims involve trial counsel's ineffective assistance at guilt and penalty phases; one claim involves shackling of Mr. Power; one claim involves the sentencing order; and one claim involves whether Mr. Power made a knowing and intelligent waiver of mitigation. The Appellee misled the Court with its mischaracterization because most of the eight claims do not involve Mr. Power's mental ability at the time of trial and sentencing. (PC-R. 568-571).

It also should be noted that the Appellee repeatedly and

erroneously referred to Judge Blackwell White as Judge Walker. (Amended Answer Brief at 6,7,9).

On February 28, 2000, this Court granted Appellant’s Motion to Strike Answer Brief of Appellee/Cross Appellant and ordered that an amended answer brief be filed that deletes reference to material outside the record on appeal. Despite this Court’s order, the Appellee persisted in its Amended Answer Brief in explaining why it relied on material outside the record on appeal. In one paragraph and one footnote, the Appellee attempted to explain its improper behavior. (Amended Answer Brief at 14-15). This information mentioned by the Appellee should not be considered and sanctions should be imposed against the Appellee for ignoring this Court’s order to delete reference to “all material outside the record on appeal.”

ARGUMENT IN REPLY

ARGUMENT I

THE LOWER COURT ERRED IN GRANTING THE STATE’S MOTION TO DETERMINE MR. POWER’S COMPETENCE TO ASSIST COLLATERAL COUNSEL AT EVIDENTIARY HEARING WHEN COUNSEL FOR MR. POWER HAS NOT RAISED A COMPETENCY CLAIM AND HAS NO FACTUAL INDICATIONS OF MR. POWER’S INCOMPETENCE.

The Appellee asserts that it understands the difference between a claim that trial counsel failed to investigate

mental health issues for mitigation and a claim challenging the defendant’s competency. (Amended Answer Brief at 18). Yet despite this assertion, the Appellee cites to cases that involve a defendant’s competency to be executed, Provenzano v. State, 24 Fla. L. Weekly S406 (August 26,1999) and Medina v. State, 690 So. 2d 1241 (Fla. 1997). Competency to be executed has no relevance to whether Mr. Power is competent to proceed in post-conviction. Competency to be executed is not an issue that is before this Court and is not an issue that is before the trial court.

Despite the Appellee’s assertions, it continued to confuse the issues raised by Mr. Power. Mr. Power raised two issues: The first issue was should the trial court appoint competency evaluators when post-conviction counsel has not raised the issue and has not provided any factual basis for whether Mr. Power is competent to proceed in post-conviction. Competency in post-conviction has no bearing on competency to be executed. It has no bearing on whether Mr. Power may have been competent ten (10) years ago in penalty phase. The issue pertains to today and now. The second issue was whether the State should be entitled to a compulsory mental health evaluation when it failed to request an evaluation in 1990 at penalty phase and has offered no authority showing it is

entitled to an evaluation.

Throughout the Appellee's argument on competency to proceed in post-conviction, it repeatedly argues about whether Mr. Power had the ability to consult with counsel at sentencing. The Appellee argued that because one defense expert said that Mr. Power's ability to assist in the preparation of his defense would have been significantly impaired allows the State to seek an evaluation as to whether Mr. Power is competent to proceed in post-conviction today, ten (10) years later. (Amended Answer Brief at 19).

This is wrong. Mr. Power's competency at sentencing in 1990 has nothing to do with whether Mr. Power is competent to proceed in post-conviction today. Competency fluctuates depending on the differing demands placed on defendants in different proceedings. See, Drob, Berger & Weinstein, Competency to Stand Trial: A Conceptual Model for its Proper Assessment, 15 Bull. Am. Acad. Psychiatry & L. 85, 85-89 (1987).[1]

Whether Mr. Power was capable of waiving penalty phase mitigation in 1990 is irrelevant for the purpose of whether

---

[1]See also State v. Debra A.E., 188 Wis. 2d 111 (1994) where the court noted that "[c]ompetency is a contexualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made."

Mr. Power is competent to assist post-conviction counsel today.

Despite the Appellee's assertions, Appellant has not called Mr. Power's competency into question. Collateral counsel is in the best position to make an informed decision about a defendant's understanding of the proceedings against him. Collateral counsel also is in the best position to assess a client's ability to make the decisions required of the defendant and provide whatever assistance is necessary. Yet the trial court and the State completely discounted counsel's opinion that there was no reason to question Mr. Power's competency.

Instead of relying on counsel's judgment, the Appellee determined without the slightest factual predicate, as required by Carter v. State, 706 So. 2d 873 (Fla. 1998), that Mr. Power may be incompetent and required a competency evaluation. At no time has counsel alleged that Mr. Power is incompetent to proceed in post-conviction.

Counsel has an obligation to investigate and analyze the competency issue if the defendant's appearance, action or statements suggest he is incompetent. Speedy v. Wyrick 702 F. 2d 723, 727 (8th Cir. 1983). It is defense counsel who is best able to decide, based on private communications and

interactions with the defendant, how the defendant's mental state affects his ability to assist in his own defense. Counsel for Mr. Power has not raised the issue of competency because she has no factual indication that he is incompetent to proceed in post-conviction.

It is the Appellee, who only after it received expert reports, determined without any facts that Mr. Power was not competent to proceed in post-conviction. None of the expert reports give any indication that Mr. Power is not competent to proceed in post-conviction. The expert reports submitted by Mr. Power speak of Mr. Power's ability in 1990 to assist counsel in his defense. None of those reports speak of Mr. Power's ability to assist collateral counsel in post-conviction. Not one of those reports speak of Mr. Power's inability to assist collateral counsel in post-conviction.

None of the cases cited by the Appellee involve competency to proceed in post-conviction. The cases cited by the Appellee involve waiving mitigation at trial. That is not the issue here.

ARGUMENT II

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO COMPEL MR. POWER TO UNDERGO A MENTAL HEALTH EVALUATION BY THE STATE, WHEN THE STATE WAIVED ACCESS TO MR. POWER BY FAILING TO REQUEST A PRIOR MENTAL EXAMINATION; WHEN THERE

IS NO AUTHORITY FOR SUCH AN EVALUATION; AND THE ISSUES TO BE ADDRESSED AT AN EVIDENTIARY HEARING INVOLVE INEFFECTIVE ASSISTANCE OF COUNSEL.

The Appellee erroneously asserts that the State is entitled to compel a mental health evaluation of Mr. Power. The Appellee is unable to cite to any authority or case for this proposition. The Appellee relies on Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994), which applies to penalty phase but has not been extended to post-conviction.[2]

In Burns v. State, 609 So. 2d 600 (Fla. 1992), this Court addressed the state's right to a mental evaluation in a

---

[2]In a footnote, the Appellee also cites to the Death Penalty Reform Act of 2000 that allows for a state compelled mental health evaluation (Amended Answer Brief at 22).

A challenge to the Act has been filed by the office of the Capital Collateral Regional Counsel -South, of which Mr. Power is a party. See, Lloyd Chase Allen, et al. v. Robert A. Butterworth, etc. et al., Case No. SC00-113 (Southern Region filing an "Emergency Petition for Writ of Prohibition, to Invoke this Court's All Writs Jurisdiction, Motion to Declare Unconstitutional the "Death Penalty Reform Act of 2000" with Request for Immediate Temporary Injunctive Relief, Further Briefing, and Oral Argument."

On February 7, 2000, this Court issued an Order readopting Rules 3.850, 3.851 and 3.852 as they existed prior to the effective date of the Act and held that the rules readopted shall prevail on all actions for capital post-conviction relief until June 30, 2000 or such time as the Court adopts new rules, whatever comes first. See, In Re: Rules Governing Capital Postconviction Actions, Case No. SC00-242.

footnote:

> We do not pass on whether the court erred in denying the State's request to have its expert examine Burns. However, <u>because there is no rule of criminal procedure that specifically authorizes a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigating factors during the penalty phase of trial, the matter has been brought to the attention of the Florida Criminal Rules Committee for consideration.</u>

Id. at 606 n. 8 (emphasis added).

This Court clearly articulated the need for a rule to authorize this procedure in <u>Burns</u>. This observation is consistent with prior holdings of the Florida Supreme Court about compelled examinations. In <u>State v. Smith</u>, 260 So. 2d 489 (Fla. 1972), this Court held that a trial court was without authority to order that witnesses be examined for visual acuity when no provision in the criminal rules authorized such an order.

The Appellee argues that ex post facto is not an issue here. The Appellee is wrong. The Appellee is attempting to use a 1996 rule of criminal procedure to apply to Mr. Power's case ten (10) years after the fact. A change in law that takes a seemingly procedural form may be an ex post facto law if it alters a substantial right. <u>Miller v. Florida</u>, 482 U.S. 423 (1987). <u>Dobbert v. Florida</u>, 432 U.S. 282 (1977),cited by

the Appellee, held that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id. at 293.

Allowing Mr. Power to be evaluated by a state mental health expert is not simply procedural but severely affects his personal rights. Allowing a state mental health expert to perform a compulsory mental health evaluation on Mr. Power would
force Mr. Power to be a witness against himself and would help the state in its effort to execute him.

The Appellee argues that Mr. Power's Fifth Amendment concerns are "diminished if not eliminated." (Amended Answer Brief at 26). Yet, <u>none</u> of the cases cited by Appellee support this position. In fact, the Appellee is unable to cite to one single case to support its position that Mr. Power's Fifth Amendment rights are "diminished if not eliminated."

In upholding Florida's death penalty statute, this Court rejected arguments that it violated the privilege against self-incrimination by holding that the privilege applies separately at the penalty phase. <u>State v. Dixon</u>, 283 So. 2d 1, 8 (Fla. 1973), <u>cert</u>. <u>denied</u>, 416 U.S. 943 (1974):

> Another advantage to the defendant in a post-conviction proceeding, is [the] right

> to appear and argue for mitigation. The state can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the state. A defendant is protected from self-incrimination through the Constitution of Florida and of the United States...In no event, is the defendant forced to testify. However, if [the defendant] does, [the defendant] is protected from cross-examination which seeks to go beyond the subject matter covered on ...direct testimony and extend to matters covering aggravating circumstances.

Id. at 7-8; accord Estelle v. Smith, 451 U.S. 454 (1981).

Contrary to the state's assertion that Mr. Power's Fifth Amendment rights are "diminished if not eliminated," Mr. Power's privilege against self-incrimination and the right to remain silent remain intact. See, Harich v. State, 437 So. 2d 1082, 1085 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Magil v. State, 386 So. 2d 1188, 1190 (Fla. 1980), cert. denied, 450 U.S. 927 (1981). Mr. Power has no obligation to assist the state in meeting its burden to rebut mitigation.

The privilege against self-incrimination is secured only when a criminal defendant has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own free will and to suffer no penalty...for such silence." Estelle v. Smith, 4125 U.S. 454 (1981)(quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964). Mr. Power cannot be personally

required to disclose to the prosecution any information bearing on either aggravating or mitigation. Cf. Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990), rev. denied, 576 So. 2d 286 (Fla. 1991)(finding court-appointed psychiatrist's testimony concerning incriminating statements provided by defendant violates fifth amendment).

The danger of compelling Mr. Power to share with a state psychologist his feelings and thoughts is incredibly grave. Mental health is not an exact science. Mr. Power can find his words and thoughts being twisted beyond recognition. A state psychologist will offer rebuttal mitigation based on cursory interviews and evaluations. After the state elicits such information, it will no longer matter whether the defendant raises mental issues in mitigation. Such information cannot be stored away to be used only in the context of rebutting mental mitigation; it will shape much of the state's case. As this Court held in Dixon, the right against self-incrimination protects defendants from providing aggravating evidence that will be used to seek the death penalty. 283 So. 2d at 8.

No guidance exists to determine under what circumstances a state expert may examine a defendant in post-conviction. In Mr. Power's case, the trial court authorized counsel to be present during the exam but cannot participate(PC-R.601-602).

But other questions remain unanswered. May counsel object to certain questions? What, if any, sanctions can the court impose if the defendant refuses to answer questions? Does the prosecuting attorney or an investigator have the right to be present? Does a defense mental health expert have the right to be present? May the interview be videotaped or otherwise recorded? Does the defendant have an automatic right to a hearing pursuant to Kastigar v. United States, 406 U.S. 441 (1972), at which the State must show it obtained information independently of the compelled examination?

No clear guidance has been provided from the trial court because there is no rule in place. No direction has come from this Court because there are no rules in place for such an exam.

The Appellee argues that "even if appellant's claim were limited to showing that counsel failed to develop mental health mitigators, the State would still be entitled to rebut this evidence with testimony from its own mental health experts to address the prejudice prong of Strickland." (Amended Answer Brief at 29).

No explanation is offered to support the Appellee's argument. No authority or case law is offered to support the Appellee's position. No authority or case law is offered

because there is no authority or case law. The issue is whether Mr. Power's trial attorneys were ineffective in failing to investigate mitigation at trial. Mr. Power has alleged that his trial attorneys were ineffective for failing to investigate and present mitigation and that Mr. Power lacked the ability to make a valid waiver of mitigation based on counsel's ineffectiveness. Despite Appellee's assertion to the contrary, Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994) is precisely the point.

Deaton waived his right to testify and to call witnesses in mitigation. His mental health did not become the focus of the case. The focus of his case, as it should be here, was whether Mr. Deaton's counsel failed to adequately investigate mitigation and whether Mr. Deaton's waiver of those rights was knowing, voluntary and intelligent. Because of counsel's deficient performance in failing to investigate mitigation before consulting with Deaton about the decision to waive or present mitigating evidence, "such ineffective assistance was prejudicial." Deaton at 9. Deaton's mental health was not an issue. In Mr. Power's case, the issue is counsel's effectiveness and how Mr. Power's waiver was affected by that effectiveness.

The Appellee argues that Mr. Power placed his mental

condition in issue. This assertion cannot be made until the evidentiary hearing begins and Mr. Power has put on his case. The mere fact that the defense has explored the potential for testimony through mental health evaluations does not necessarily dictate that such evidence will be produced at an evidentiary hearing.

The Appellee argues that it has the right to compel a psychological examination of Mr. Power based merely on the possibility that his experts will be presented. If Mr. Power decides against presenting the defense experts at evidentiary hearing, the State would then have no reason to compel Mr. Power to undergo an evaluation. Until Mr. Power has presented his case, the State's position seeking a compelled examination is premature.

Courts have held that only under extreme and compelling circumstances can they order physical or psychological examination. In State v. Drab, 546 So. 2d 54 (Fla. 4th DCA), rev. denied, 553 So. 2d 1164 (Fla. 1989), the court held that a defendant was not entitled to an independent physical examination of a state witness absent demonstrating that extreme and compelling circumstances warranted it. At a minimum, the Appellee should at least have to articulate specific reasons for wanting to compel Mr. Power into a mental

health exam by a state expert. The Appellee should have to show that a compulsory examination is the only and least restrictive means of obtaining such information. The Appellee has not done so because no rule or case law provides what the Appellee must show before requesting the examination.

In Dinkins v. State, 244 So. 2d 148 (Fla. 4th DCA 1971), the court said that no statute or rule in Florida granted trial courts the right to order psychiatric examinations of state witnesses. See also, Fulton v. State, 352 So. 581 (Fla. 3rd DCA 1977) (trial court properly denied defense request for examination where request based on noting more than unsubstantiated reports of victim's alleged instability). In State v. Smith, 260 S. 2d 489 (Fla. 1972), an order was quashed requiring a witness to submit to an eye examination because neither the common law nor the rules of criminal procedure authorized a court to "grant a motion compelling witnesses to submit to a physical examination of any sort." This Court said that even in the rare instance justifying such examinations, the moving party bears the burden of showing such necessity. Id. at 491. The Appellee has shown no such necessity in this case.

The Appellee also has failed to prove that conducting a compelled psychological examination is the least restrictive

means of obtaining such rebuttal. The State has other means to obtain information. The Appellee has never explained how the potential information offered in the mental health reports is false, untrustworthy or misleading to the trier of fact.

The Appellee failed to address that its request to evaluate Mr. Power is untimely. The State has been involved in litigation against Mr. Power since 1987. Never in the last **thirteen (13) years** has the State requested that Mr. Power be compelled to undergo a state mental health evaluation. Even if it had a right to an evaluation, it waived the right to ask for one thirteen (13) years ago.

ANSWER BRIEF IN CROSS APPEAL

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PROTECTIVE ORDER PROHIBITING THE STATE FROM OBTAINING APPELLANT'S CONFIDENTIAL MEDICAL RECORDS FROM THE ORANGE COUNTY JAIL.

The trial court was correct in quashing the subpoena and granting defense motion for a protective order. The State failed to show good cause why it was entitled to Mr. Power's confidential medical records. The State's request for the records was overbroad and vague. The State sought "any and all medical records pertaining to treatment or observations while incarcerated." See Notice of Subpoena of Medical Records (Supp. at 29). No where in the subpoena did the State explain what years it was seeking information. It was only in Appellee's Cross Appeal that defense counsel learned that the State was seeking records from 1987 through 1990.[3]

In its effort to obtain Mr. Power's medical records, the State initially argued that the records were not discovery and the State was entitled to obtain the records as it prepared

[3]The Praecipe for Records Subpoena (Supp. at 30) was never served on defense counsel. The first time counsel saw the praecipe, which outlined the years of records sought was in the Appellee's Answer Brief. It is the Praecipe and not the subpoena that lists the years in which Mr. Power was incarcerated at the Orange County Jail.

for an evidentiary hearing in post-conviction. The State repeatedly argued that it had the right to obtain Mr. Power's medical records, <u>without</u> a court order and <u>without</u> the necessity of a judge's approval, under Fla. Stat. Section 455.667 involving Regulation of Professions and Occupations, General Provisions.

The State argued:

> This isn't discovery as such. It's obtaining records for preparation of our case...It cites the statute right there. <u>Says that they can be subpoenaed and noting about requiring a court order</u>. We always send them out, these notices out when they subpoena medical records.

(PC-R. at 68).

The State repeatedly argued that Mr. Power's medical records were not confidential:

> They're not confidential. He has a right to notice under the statute. Nowhere does the statute say they're confidential. We have a perfect right to obtain public records pertaining the defendant.

(PC-R. at 69).

The trial court properly rejected this argument because under <u>State v. Lewis</u>,656 So. 2d 1248 (Fla. 1994), the State failed to show good cause.

Like all medical records that are confidential, Mr. Power's medical records are no exception. Mr. Power's medical records from the Orange County Jail are not public records.

See, Florida Statute section 945.10, which states that the Department of Corrections mental health, medical or substance abuse records of inmates are confidential. Mr. Power's medical records are not part of the public domain and cannot be obtained by anyone without a court order or without Mr. Power's signed release. In fact, counsel for Mr. Power cannot obtain medical records without a proper release from Mr. Power himself. Certainly, the State cannot be entitled to those records without Mr. Power's written permission either.

The Appellee argued that "privacy expectations for a convicted murderer residing on death row are certainly somewhat diminished from those of most Florida citizens." (Cross Appeal at 39).

The cases cited by Appellee does not support this position. Contrary to its argument, Hunter v. State, 639 So. 2d 72 (Fla. 5th DCA 1994) recognized that a patient's medical records were protected under Florida's right to privacy. See, Article I, Section 23, Fla. Const. Fla. Stat. Section 395.3025 (4)(d) is a legislative determination that singles out hospital records that are entitled to protection from prying eyes. See Acosta v. Richter, 671 So. 2d 149, 154 (Fla. 1995)(noting that statute analogous to section 395.3025(4)(d), section 455.241 (2), Florida Statutes creates a "broad and

express privilege of confidentiality" as to medical records and medical condition of patient).

In Hunter, it was held that the trial court

> must act as a shield to protect the patient's right to privacy by determining whether medical records are relevant to a pending criminal investigation. The role of the court is extremely important because personal and potentially embarrassing information contained in the medical records may be disclosed. This invasion of a patient's privacy can only occur after the court finds a compelling state interest and that the information is relevant.

639 So. 2d at 74

The privacy amendment is to "afford individuals some protection against the increasing collection, retention, and use of information relating to all facts of an individual's life. Rasmusen v. South Florida Blood Services, Inc. 500 So. 2d 533, 536 (Fla. 1987).

Where a privacy right attaches, the state must show a compelling state interest and the state has used the least intrusive means to accomplish its goal. See, Shaktman v. State, 553 So. 2d 148, 151-152 (1989). A compelling state interest is established by showing that the police have a reasonable suspicion that protected materials contain information relevant to an ongoing criminal investigation. Id. at 152.

To show that the least intrusive means have been used to

invade a privacy right, the state must show compliance with procedural safeguards which, "at a minimum, necessitate judicial approval prior to the state's intrusion into a person's privacy."

Mr. Power does not lose his privacy interests because he is convicted of a crime. Mr. Power retains his privacy interests in his jail medical records. Moreover, there is no on-going criminal investigation in Mr. Power's case. This case has been final since 1990. See, <u>State v. Kokal</u>, 562 So. 2d 324 (Fla. 1990).

The Appellee has failed to show that the confidential records are likely to contain relevant evidence and he must advance a good faith factual basis that is not merely a desperate grasping at straws. <u>Katlein v. State</u>, 731 So. 2d 87 (Fla. 4th DCA 1999).

The Appellee argued:

> The Orange County jail records <u>may</u> contain highly relevant evidence regarding appellant's behavior, and any medical treatment he received at the time of trial and sentencing. For instance, these records <u>might</u> establish that appellant was not (sic) taking any psychotropic mediation at the time of trial and sentencing.

(Cross Appeal at 38)(emphasis added).

The Appellee is on a fishing expedition. Mr. Power has never argued that he was psychotic and was taking psychotropic

medication. No where in the records does it suggest that Mr. Power was taking psychotropic medication. The Appellee is grasping at straws.

The Appellee also argues that since Mr. Power's experts had access to his Department of Corrections inmate file, he too should be entitled to have them. Under Fla. Stat. Chapter 119, the Appellee is entitled to obtain Mr. Power's Department of Corrections inmate records. Like Mr. Power's counsel, Appellee can write a letter seeking access and can pay the Department of Corrections for his inmate file. He is not, however, entitled to his confidential Department of Corrections medical file. Under Fla. Stat. section 945.10, Mr. Power's mental health, medical or substance abuse records of an inmate or offender are confidential. The State cannot at whim issue a subpoena and have Mr. Power's confidential medical records appear without notice to opposing counsel or showing of good cause.

Moreover, Appellee argues that because it had access to Mr. Power's previous medical records from California, it was entitled to all of his records, including his Orange County Jail records. (Cross Appeal at 37). Mr. Power signed a medical release for his California records in 1990 (R. at 431). Those records were then turned over to the State by Mr.

Power's defense attorney. Mr. Power has not signed a medical release for his Orange County Jail records. Because prior defense counsel may have turned over confidential records to the State does not mean that current counsel is obligated to do the same.

The Appellee cited to State v. LeCroy, 641 So. 2d 853 (Fla. 1994) for the proposition that when a defendant claims ineffective assistance of counsel, he waives attorney client privilege and the waiver includes a limited right of the State to review the defense attorney file. (Cross Appeal at 35).

In this case, the State had ample opportunity to review the trial attorney files in Mr. Power's case. The State also had ample opportunity to depose Mr. Power's two trial attorneys. Mr. Power has alleged that his trial attorneys were ineffective for failing to investigate and present mitigation, and that Mr. Power lacked the ability to make a valid waiver of mitigation based on counsel's ineffectiveness.

The issue is whether his attorneys investigated Mr. Power's background and mental health and why no mitigating evidence was presented. The issue is not what Mr. Power's confidential medical records reveal regarding his competency.

The Appellee argues that Mr. Power's experts reviewed "all kinds of personal records of the appellant including

corrections records, psychiatric records and school records." (Cross Appeal at 35).

It should be noted again that at trial, the State Attorney did most of the investigation into Mr. Power's background and turned those records over to the defense. The State Attorney obtained the majority of background materials on Mr. Power and turned those over to the defense. The State Attorney, in fact,

has so many records relating to Mr. Power that it supplied the court-appointed competency experts hundreds of pages of documents on Mr. Power's life (Supp. at 23-24).

The Appellee acknowledged that experts for Mr. Power did not review his Orange County jail medical records.

The Appellee argued:

> ...the appellant's own experts have already reviewed and utilized appellant's Department of Corrections Records, including his medical records, in making a diagnosis concerning appellant's medical condition. <u>It is highly suspect</u> that while these experts viewed Appellant's Department of Corrections records, including his medical records, and even some medical records from California where appellant was previously incarcerated, there is nothing in these reports to suggest that they reviewed appellant's Orange County jail medical records.

(Cross Appeal at 38)(emphasis added).

It is unclear from Appellee's argument what is "highly suspect" and why the state should be entitled to Orange County jail medical records when the defense experts never relied on

them.

The trial court was correct when she ruled that the State failed to show good cause to turn over Mr. Power's medical records. The trial court made a finding of fact that no good cause was shown and the State was unable to prove that the records were relevant. The trial court's ruling deserves a presumption of correctness. Erroneous rulings of law are reversible unless the State proves the error harmless beyond a reasonable doubt. See, State v. Diguilio, 491 So. 2d 1129 (Fla. 1986). The State has failed to do so here.

CONCLUSION

For the reasons stated here and in the Initial Brief, the Appellant respectfully requests that this Court reverse and/or quash the orders of the Circuit Court ordering that Mr. Power undergo a competency evaluation and a compelled mental health evaluation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on March 11, 2000.

PAMELA H. IZAKOWITZ
Florida Bar No. 0053856
Capital Collateral Regional Counsel - South
303 S. Westland Avenue
P.O. Box 3294
Tampa, FL 33601-3294
(813) 259-4424
Attorney for Appellant

Copies furnished to:

Scott Browne
Department of Legal Affairs
Office of the Attorney General
2002 N. Lois Avenue, Suite 700
Tampa, FL 33607